tions in their favour are valid. Even if they are not to be regarded as members of the family of the late Tengku Nik Maimunah, as strangers there is nothing in law which prevents such dispositions from being otherwise than valid. Pure Islamic law as expressed in the opinions of learned authors and as applied by a number of High Court Benches in India upholds the validity of a *wakaf* made in favour of strangers. Furthermore, section 3(2) of the Trengganu *Wakaf* Validating Enactment 1972 clearly validates such *wakaf*.

For the reasons stated above, we now hold that the *wakaf* made by the late Tengku Nik Maimunah Hajjah binti Almarhum Sultan Zainal Abidin on June 13, 1961 is valid and the cross-appeal therefore fails.

We now come to consider the appeal proper by the present three appellants. Harun J. in the court below held that the *wakaf* is valid only to the extent of one-third because section 61 of the Trengganu Administration of Islamic Enactment No. 4 of 1955 enacts as follows: —

"Whether or not made by way of will or death-bed gift, no *wakaf* or *nazar* made after the commencement of this Enactment and involving more than one-third of the property of the person making the same shall be valid in respect of the excess beyond such one-third unless expressly sanctioned and validated by the beneficiaries."

It is the contention of the appellants that this section only deals with *wakaf* or *nazar* which is made by way of will or death-bed gift and that it has no reference whatsoever to a *wakaf* or *nazar* made *inter vivos*. Consequently, in their submissions the *wakaf* in this case being made during the lifetime of the settlor must be wholly valid.

According to Islamic law, a Muslim has power during his lifetime to transfer all his property to anyone, but after his death or during his death illness in the absence of consent by his heirs, he may only do so to the extent of one-third of the property. A *wakaf* under Islamic law can be made either *inter vivos* or by way of will. An *inter vivos wakaf* takes effect immediately to divest the ownership in the property from the settlor. Consequently, the one-third limitation has no application to an *inter vivos wakaf*. But where a *wakaf* is created by will or made during the death illness of the deceased settlor, the one-third limitation applies unless such *wakaf* is consented to by the heirs. Consequently, in the absence of such consent, only the gift to the extent of one-third of the *wakaf* property is valid. Reverting now to section 61 of the Trengganu Enactment, in our view, it is clear that this Enactment never contemplates of legislating upon or changing the substance of Islamic law particularly on this point which is so basic. Far from it, as it is merely an Enactment which its long title says —

"To consolidate the law relating to the administration of all matters relating to the Religion of Islam and the religious courts."

Since by the unwritten Islamic law, the one-third limitation applies only to a *wakaf* or *nazar* made by way of will or during death illness, it can never have been the intention of the Trengganu Legislature that such one-third limitation also applies to *wakaf* made *inter vivos*, such as the one in this appeal. Furthermore, a close reading of section 61 clearly shows that it merely deals with a *wakaf* or *nazar* made by will or death-bed gift. It made no mention of a *wakaf* made *inter vivos*. The expression "whether or not made by way of will or death-bed gift" must be interpreted to mean what it says. It does not and cannot, however, refer to a *wakaf* made *inter vivos* which is not said in the expression. The general principle *expressio unius exclusio alterius* or *expressum facit cessare tacitum* must therefore apply. In view of our reasonings above, we agree with the submission of the counsel for the appellants that the *wakaf* in this case is wholly valid and that the one-third limitation contained in section 61 of the Enactment, being confined only to *wakaf* or *nazar* made by way of will and death-bed gift, has no application to the *wakaf* in the present case.

Hence we allow the appeal and dismiss the cross-appeal with costs here and the court below. The deposit has to be refunded to the appellants.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Chung & Huang; Skrine & Co.*

PACIFIC & ORIENT INSURANCE COMPANY SDN. BHD. v. WOON SHEE MIN

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. & Abdul Hamid J.) March 22 & September 8, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 217 of 1977]

Arbitration — Application to set aside award of arbitractor — Motor car insurance — Car badly damaged in accident — Arbitrator awarding damages on total loss basis — Whether award involved error of law or fact.

Insurance — Motor car damaged in accident — Arbitration — Awarding damages on total loss basis.

The respondent had taken out a comprehensive policy from the appellants insuring his car against loss or damage to the maximum sum of $10 000. The car was involved in an accident and was badly damaged. The appellants could not agree on the amount required for repair and the car was left at the repairer's shop without anything being done to it. The matter was referred to arbitration and the arbitrator awarded the sum of $8.000 on a total loss basis. The appellants sought to set aside the award of the arbitrator and their application was dismissed in the High Court. The appellants appealed.

Held: there was no mistake in law or in fact in the finding of the learned arbitrator and therefore the appeal must be dismissed.

Case referred to:-

(1) *David Taylor & Son Ltd.* v. *Barnett Trading Co.* [1953] 1 W.L.R. 562, 568.

FEDERAL COURT.

H. Ball for the appellants.

A. Lee for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): This is an appeal against the judgment of the High Court, Johore Bahru dismissing an application by the appellant company to set aside the award of the arbitrator.

The respondent had taken out a policy from the appellants, a comprehensive policy in the usual form,

insuring his car against loss or damage to the maximum sum of $10,000 for period January 17, 1974 to January 16, 1975. On July 22, 1974 the car was badly damaged in an accident somewhere near Mersing. The appellants were properly informed of the accident and the car was taken down to Johore Bahru for inspection by the R.I.M.V. at the request of the police. The appellants at first wanted the car to be repaired at a workshop in Johore Bahru, but at the request of the insured agreed that the car be repaired at Mersing as the insured lived in Mersing and he wanted to see the progress of the repairs. On September 5 the Mersing repairers put up an estimate which amounted to $6,507.37 and the figure subsequently was increased to $7,137.37. The appellants cut down the repairers' estimate and agreed to pay only $2,597.35. On October 4, 1974 the appellants wrote to the repairers authorising them to proceed with the repairs at the last mentioned figure. The repairers refused to carry out the repairs for that sum. The appellants increased it by another $300, but the repairers still declined to repair for this increased amount. The car lay at the repairers' shop without anything more being done in the way of repairs. On March 26, 1975 the respondent brought an action in the High Court alleging breach of contract by the appellants, but this action was stayed as the dispute was referred to the arbitrator pursuant to condition 9 of the policy of insurance. The main term of reference was contained in paragraph 2 whereby:

"The applicant claims to be indemnified to the extent of $10,000 on a total loss basis or such other sum as the arbitrator may deem it fit to impose to reinstate the car to a road worthy condition."

After hearing evidence from both sides the arbitrator Encik Chelliah Paramjothy, a senior lawyer, gave his award on July 20, 1976.

Upon the basis that the respondent has a right to be indemnified by the appellant company for the damage to motor vehicle his award was that the appellants should pay to the respondent the sum of $8,000 "on a total loss basis" for the motor vehicle. Section 24(2) of the Arbitration Act reads "where an arbitrator ... has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside". This subsection is almost identical in wording with the English section 23(2).

However it appears from Mr. Ball's opening words that it is not on this ground that appellants depended to have the award set aside but on the inherent power of the court to set aside an award which is bad on the face of it, as involving an apparent error in fact or in law. (See *Russell* on Arbitration 18th Ed. page 349). At page 357 of the same volume appears this passage:

"An award which, on its face, fails to comply with the requirements of a valid award, will be remitted or set aside. By a somewhat anomalous extension of this rule, notwithstanding that an arbitrator's decision is in general final, if an error either of fact or law is allowed to happen on the face of the award, this is a ground for setting it aside...."

The award was attacked on several counts. Paragraph 1 of the award which is set out on pages 149 to 153 of the record states that the appellant company agreed with the insured (respondent) "to pay or make good loss or damage" to the motor vehicle.

It was indicated to us that these were not the same words used in the policy. For example paragraph 1 of section 1 of the policy reads:

"The company will indemnify the Insured against loss or damage to the Motor Vehicle and its accessories...."

Paragraph 2 of section 1 reads:

"At their own option the Company may pay in cash the amount of the loss or damage, or may repair, reinstate or replace the Motor Vehicle or any part thereof...."

I would say that the arbitrator had whilst not repeating *verbatim* these passages effectively set out their substance in that phrase.

In *David Taylor & Son Ltd.* v. *Barnett Trading Co.*[1] Singleton L.J. laid down the duty of an arbitrator in the following words: "The duty of an arbitrator is to decide the questions submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable under the circumstances" and the general drift of the appellants' submission is that the arbitrator had failed to confine himself strictly to determining the legal right of the parties.

The learned arbitrator had found that the motor vehicle had become derelict by neglect and exposure after dismantlement and that the company had failed ... to take reasonable steps to *recover* it soon after the dispute over the cost of repairs (between appellants and the repairers). It was submitted that there was no duty for the company to recover the vehicle, but to pay for the repairs to it and that by so finding the arbitrator had gone outside his term of reference.

It is plain that on receipt of the letter from the repairers dated October 6, 1974 notifying the appellants that the adjustments made by their adjuster to the estimated cost of repairers was unacceptable appellants could either raise the sum offered to something acceptable by the repairers or failing that cause repairs to be undertaken by repairers of their choice, as they are entitled to do under section 1 paragraph 2 of the policy. By recovering the vehicle there can be no doubt that the arbitrator meant its removal to a repairer of appellants' choice. We can see nothing wrong with this interpretation of the only other alternative in the policy open to the insurers (appellants).

The learned arbitrator in paragraph 5 of his award came to a finding that there was no evidence of theft of the parts or accessories before him because of which he found no merit in the argument advanced by the appellants that missing or lost parts are the responsibility of the insured (respondent) i.e. that the appellants/insurers were not liable to pay unless the motor vehicle was stolen.

Referring to paragraph 6 of the award, Mr. Ball contends that there is no evidence of total loss as a result of the accident. In this he was certainly mistaken for PW2 the proprietor of the repair shop Yong Wah Welding & Spraying did say that as a result of the dispute over the costs of repairs the car had to be left out in the open for about six months after which it could no longer have been repaired at his

original estimated cost of $6,500 since the engine would have become jammed up. The car had been left outside his workshop after this failure to come to an agreement. Whilst the total loss estimated by the learned arbitrator at $8,000 did not directly arise out of the accident, it certainly arose directly out of their subsequent conduct in not having it repaired elsewhere after the breakdown in repair cost negotiations.

Mr. Ball referred us to *Russell* on Arbitration 18th Edition page 499 Form 43, wherein one of the grounds for setting aside an arbitrator's award is where the award "on the face thereof is bad in law". He then repeated the arguments advanced by the manager of the appellant company viz.

(a) in order to succeed in his claim the respondent had to establish that his motor vehicle suffered loss or damage as a direct result of the accident; and the fair estimate of such damage was a total loss or a sum which the arbitrator had to assess having heard both parties;

(b) there was no evidence before the arbitrator to show that the vehicle was a total loss.

According to him to say that the arbitrator had come to a finding of fact was wrong, because had he done so there would be no total loss and that the learned appellate judge, in his grounds of judgment was merely repeating the error of the arbitrator.

There was evidence that for all practical purposes the car had been totally destroyed, reduced to a heap of junk owing to, as the learned arbitrator found, failure and neglect of the appellants to take reasonable steps to have it repaired elsewhere after the dispute with the repairers over the cost of repairs.

It is plain that although the maximum amount which the insurers can be called upon to pay is the estimated value of the car as stated in the policy, it does not follow that they will always be obliged to pay the whole amount even though the car is completely lost or destroyed (See *Shawcross* on Motor Insurance 2nd Edn. pages 508/509). The learned arbitrator had obviously taken into account depreciation.

We therefore find that there was no mistake in law or in fact of the finding of the learned arbitrator and dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Sault, Keith Sellar & Co.; Nik Hussain, Ibrahim & Abdullah.*

LIM KIT SIANG v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya), Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Chang Min Tat F.JJ.) August 6 to 9 & September 14, 1979]

[Kuala Lumpur — Federal Court — Criminal Appeal No. 36 of 1978]

Criminal Law and Procedure — Official Secrets — Receipt of unauthorised secret information — Disclosure of secret information — Duty to reveal source of information — Parliamentary privilege — Disclosure to member of Parliament — Sentence — Official Secrets Act, 1972, ss. 8(1), (2) & 11.

Official Secrets — Receipt of unauthorised official secret information and disclosure thereof — Offence — Official Secrets Act, 1972, ss. 8(1), (2) & 11.

Constitutional Law — Parliamentary privilege — Disclosure of secret information outside Parliament — Official Secrets Act, 1972.

This was an appeal from the conviction of the appellant on five charges under the Official Secrets Act, 1972 for (a) receiving secret official information having reason to believe at the time of the receipt of the information that it was unauthorised; (b) failing to disclose the source of the information; (c) failing to take reasonable care to prevent publication of the information; (d) communicating the information in a speech and (e) divulging the said information in a letter to a news review. The information in question related to tenders in relation to the purchase of fast strike crafts for the Royal Malaysian Navy. The appellant was convicted and sentenced to $5,000 or 1 year imprisonment on the 1st charge; $1,000 or 2 months' imprisonment on the 2nd charge and $3,000 or 9 months' imprisonment on each of the 3rd, 4th and 5th charges (see [1979] 2 M.L.J. 37). The Public Prosecutor cross-appealed on the sentences, contending that they were inadequate.

Held: (1) the function of the court is judicial not legislative and the court ought not to legislate under the guise of exercising its judicial powers and functions. In particular the court has no power to create a right for any person to ignore the provisions of the Official Secrets Ordinance or any other law of the land;

(2) the learned trial judge in this case was correct in holding that the information referred to in the charges was obtained in contravention of the Act;

(3) the duty of the appellant as a Parliamentarian does not include the right to disclose or make available for disclosure secret information outside the walls of the House to the public at large, whatever his motives might be;

(4) the offences in the charges have therefore clearly been committed. Although the offences were of a serious nature, the learned trial judge was right in not imposing a sentence of imprisonment;

(5) no reasons were given by the learned trial judge for the amounts of the fines imposed. In view of the circumstances in this case the fines should be reduced as follows: $1,500 on the 1st charge; $1,000 on the 2nd charge; $1,000 on the 3rd charge; and $1,500 each on the 4th and 5th charges.

Cases referred to:-

(1) *Malone* v. *Metropolitan Police Commissioner* [1979] 2 W.L.R. 700, 725-6.

(2) *R.* v. *Blake* [1961] 3 All E.R. 125.

(3) *Rex* v. *Crisp and Homewood* (1919) 83 J.P. Reports 121.

FEDERAL COURT.

Karpal Singh for the appellant.

Datuk Abu Talib bin Othman, Solicitor-General, (*Mohamed Adnan bin Datuk Shuaib* with him) for the respondent.

Cur. Adv. Vult.